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Supreme Court of the United States

OCTOBER TERM 1916

No. [redacted]53

NORTH PACIFIC STEAMSHIP COMPANY,
Appellant,

vs.

HALL BROTHERS MARINE RAILWAY AND SHIPBUILDING COMPANY,
Appellee.

BRIEF FOR APPELLEE.

WARREN GREGORY,
ALLEN L. CHICKERING,
Proctors for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Supreme Court of the United States

OCTOBER TERM 1916

No. 745

NORTH PACIFIC STEAMSHIP COMPANY,
Appellant,

vs.

HALL BROTHERS MARINE RAILWAY AND SHIPBUILDING COMPANY,
Appellee.

BRIEF FOR APPELLEE.

I.

STATEMENT OF CASE.

Appellant seeks the judgment of this Court that the District Court of the United States was without jurisdiction to hear or determine the cause by reason of the fact that the subject matter was not maritime.

The argument for appellant is built upon an erroneous premise, viz., that this subject matter is the enforcement of an *oral* contract whereby appellee, a corporation, engaged in the business of

shipbuilding and repairing, was to lease or turn over to the appellant, a shipowner, the former's marine railway, shipyard, equipment, supplies and laborers for a period of time sufficient to enable the *appellant* to repair its vessel, the "Yucatan".

Counsel say in their brief (p. 11):

> "The subject matter of the contract was the shipyard, which appellant hired as a whole—including machine shop and marine railway—for the purpose of making repairs to its ship itself. Appellant did not bargain for making repairs or for the *results* of the use of the equipment, labor and materials supplied by libelant, but for the *use* thereof by itself. This appears both from the writing, Exhibit A, and from the oral testimony.
>
> The court will note that the memorandum was not the usual form of contract whereby a shipbuilding company agrees to repair a ship. It did not call for the performance by libelant of any service on or for a ship, either on water or land. *It called merely for the supply of a shipyard, nothing more.* That constituted its subject matter. In other words, appellant agreed to pay a stipulated price for the use of a shipyard and equipment, a subject matter having nothing to do with ships or shipping." (Last italics ours.)

And again (p. 12):

> "Exhibit A is not the contract itself; it is evidence of certain terms of the contract. It is in fact a schedule of charges for use of the marine railway, equipment, laborers, etc. It is absolutely silent as to who was to make repairs or what repairs were to be made; it contains none of the usual provisions of a complete contract even for the use of a yard."

The facts of the case, as shown clearly by the record, do not necessitate any prolonged discussion of the interesting question as to whether or not a lease of a marine railroad or shipyard, over which the lessee is to have full control and dominion for the repair of a vessel, is a maritime contract. The contract alleged and proved was not such an agreement. It seems sufficient to refer only to the pleadings to demonstrate this.

The original libel was filed on May 15, 1912 (fol. 10). This pleading did not contain as exhibits the various bills rendered, and so an amended libel was filed (fols. 11-15). In both these pleadings it was alleged, among other things (fol. 12):

> "That heretofore, to wit, in the month of May, 1911, the said American steamer 'Yucatan' then and there lying in the harbor of Winslow, state of Washington, stood in need of certain repairs and supplies to enable her to perform her voyages upon the Pacific Ocean and elsewhere, and the libelant herein on the 19th day of May, 1911, entered into a contract with the respondent herein, *to repair said American steamer*, a copy of which contract is hereto attached, marked 'Exhibit A' and made a part hereof."

The written contract, Exhibit A, is not, as counsel claim, unusual, and it does not contain any statement which would justify the conclusion that it was in fact a lease of the shipyard so that the shipowner could do his own repairing. Its initial sentence is (fol. 16):

> "Steamship 'Yucatan'.
>
> Dear Sir: Responsive to your personal request of this a. m. for *our* terms *for making*

> *repairs to the above vessel,* we beg to submit the following:" (Then follows a statement of the various items of charge which will be made.)

Concerning labor, it stated (p. 11):

> "For all necessary labor of all classes used in repairing the vessel and furnished by us, we agree to supply same at the actual rate of wages paid each man plus fifteen (15) per cent additional, payable Monday of each week. We shall require that you have a time-keeper to check up the time of labor and machines used with our time-keeper each day in order that no misunderstanding in this regard may occur."

This contract makes it clear that the only engagement of the parties was that the appellee, a corporation engaged in the business of making repairs to vessels, should make the repairs in this case upon a certain percentage basis for labor performed and materials furnished, including the hauling of the vessel onto the marine railway and the delivery of the vessel from her dock in Seattle to the plant. There is nothing in the nature of such a contract which can legitimately force the conclusion that the *owner* was doing his own repairing or had control over the workmen. Certain bills attached as exhibits to the amended libel (pp. 28-29) show that Hall Brothers paid the foremen and the laborers. Other bills show that Hall Brothers also bought and paid for the materials. No charge was made in the nature of rental for the plant or the marine railway. If the contract had been,

indeed, one to hire or lease the yard together with the railroad, a lump sum would have been paid and the plant would have been used throughout the period of the lease or hiring without regard to the rate per hour or the division of the day into parts. The pivotal point is, from the side of the appellee, that it had at all times the control of the yard and the workmen.

To the amended libel an answer and cross-libel were filed. The answer admits the execution of the contract of May 19, 1911, stating (fol. 47):

> "Admits that, in May, 1911, respondent entered into a contract with libelant for the repairs of the Steamer 'Yucatan,' but denies that the alleged contract referred to in Article IV, and of which 'Exhibit A' therein referred to is a copy, is the whole contract entered into between libelant and respondent at said time, or on that behalf, but alleges that said 'Exhibit A' was only part of said contract and was intended to be a mere memorandum of the rates or amounts to be paid by respondent to libelant *for labor and services* to be performed during said repairs."

At folio 48 the covenants, stipulations and conditions, which it is claimed were not embodied in the written contract, are set out, and they are to the point that the appellee did not perform its services *within the time specified* and that all the labor, equipment, machinery and material available were not placed at the disposal of appellant. There was no claim that the owner was to do its own repairing nor any intimation that libelant had mistaken its

remedy by suing for maritime services and not for rental.

By its cross-libel appellant sought damages in the sum of $15,675 upon the alleged ground that the *appellee* had not completed the repairs in time and that by reason of such delay the appellant was unable to fulfill a charter of the vessel, which it had previously made with the Western Alaska Steamship Company. The fact concerning this delay was the only question at issue, and the case was tried upon that theory. The cross-libel, instead of alleging that the repairs were to be done by the appellant, is based upon the claim that the *appellee* had to do the repairs but did not do them expeditiously. It is alleged (fol. 51):

> "* * * * cross-respondent did not have a full and adequate equipment for the expeditious repairs of said steamer in its shipyard as agreed, *and did not use the inadequate equipment which it did have* for the exclusive use of cross-libelant, whereby said repairs were delayed for a further period of.....days."

If, as is now claimed, the engagement was that the shipowner should do his own repairs on a leased plant, then how can this be reconciled with the pleading of cross-libelant that it was damaged because libelant did not proceed with the work as speedily as agreed?

At the conclusion of this cross-libel (fol. 52) it is alleged:

> "That all and singular the premises are true and within the admiralty and maritime juris-

diction of the United States and of this Honorable Court."

To the extent, then, that parties may by any act confer jurisdiction upon a Court these parties have gone in the present case. Each sought in the same Court damages against the other. The case was finally decided in favor of appellee. Some time after the judgment was rendered, and after the time had expired within which appellee could seek relief in another jurisdiction, a motion to dismiss from the very jurisdiction that cross-libelant had chosen was filed by counsel substituted for those who had tried the case.

The evidence in the case was entirely devoted to the question of alleged delay in the finishing of the repairs. In the brief for appellant some extracts from this testimony are given on pages 5-8, but these extracts must be read in connection with the other testimony, it being evident that none of the parties or their counsel at that time had any notion but that the repairs had been done by the appellee. It is apparently upon these random extracts from the testimony that counsel place their chief reliance.

The issue as to jurisdiction must be finally determined by the judgment of the Court as to what is the subject matter of the cause. That subject matter must be found in the agreement sued upon. If this agreement is in writing, then it alone may be considered. If it be oral, and there is conflicting testimony concerning its terms, then the con-

clusions of the trial Court are final. The engagement herein sued upon was in writing. The trial Court found that the subject matter was within the jurisdiction of the Court. The most favorable showing for appellant is that there was presented to the trial Court a conflict of evidence, by which the admitted written contract sued upon stated that the yardowner was to do the repairs, and the testimony of certain witnesses showed that in their understanding of the contract the shipowner was to do the repairs. It is as if plaintiff should sue in the United States District Court to recover upon a promissory note in the principal sum of $2000, and at the trial a witness should testify that in his opinion the principal sum was $1500, and thereupon the defendant should move to dismiss the case upon the ground that the Court had no jurisdiction.

Even assuming that fragments of the testimony may be considered for the purpose of overthrowing the subject matter of the cause as shown by the pleadings, yet they do not bear out the claim that the control of the work was turned over to the shipowner.

It is said in the brief (p. 2):

> "This schedule (Exhibit A) is not the contract. It is a memorandum only of the rates to be charged. The contract itself rested in parol (p. 78, f. 66; p. 100, f. 97)."

Turning to these references we find on page 78 the following:

"Why, the thing was discussed between Mr. Doe and myself orally in our office I think in the forenoon, and then I agreed to embody the terms of this oral understanding in writing and he would come in the next morning and look it over and sign it if it was satisfactory. That afternoon I wrote up this letter—that is my remembrance of it—and he came in the next morning, in company with Mr. Cave, the gentleman sitting there, and we went over the ground again, practically the same as Mr. Doe and I had together, *and at the termination of that interview Mr. Doe signed the letter in question here and I signed it.*"

The other portion of the record referred to, viz., page 100, folio 97, deals with the conversation between the agents of the parties on May 18, 1911. It is apparently this oral contract upon which appellant bases its jurisdictional point. It seems only necessary to state that the conversation took place on May 18th and the written contract was signed on the following day. It, of course, being in writing, superseded all the prior verbal negotiations between the parties and is the only evidence to which the Court may look to determine such understanding.

It is submitted, therefore, that the engagement of the parties, which was the subject matter of the consideration of the Court below, was not a lease or a like agreement for a shipyard. It was very distinctly not such an agreement, and the pleadings and proceedings at the trial are persuasive that neither of the parties proceeded upon any such theory.

II.

BRIEF OF ARGUMENT.

Admiralty has always been held to have jurisdiction of claims for repairs, supplies and materials for a ship.

The Jefferson, 215 U. S. 130, page 142;
The New Jersey, 1 Pet. Adm. 223, page 227;
The Sandwich, 1 Pet. Adm. 233;
The Jerusalem, 2 Gall. 345;
The President, 4 Wash. C. C. 453;
The Robert Fulton, Paine, 620;
The Thomas Scattergood, Gilp. 1;
A New Brig, Gilp. 473;
Davis v. Child, 2 Ware, 7;
The Elecktron, 48 Fed. 689.

(The last case was a libel for breach of contract to furnish supplies.)

We do not dispute the doctrine dwelt upon at some length by opposing counsel that jurisdiction in admiralty depends on the subject matter and not on the ultimate object or purpose of the contract. Argument on this point is foreclosed by the decision of this Court in *Insurance Co. v. Dunham,* 11 Wall. 1, and by the decision of Judge Story in *The Jerusalem,* Fed. Cas. No. 7294, where it was said:

> "The true doctrine was always asserted by the learned judges of the admiralty, and has been recently recognized by Mr. Justice Buller; that the jurisdiction as to contracts depends not upon the locality, but upon the subject matter, of the contract."

In *Dailey v. City of New York,* 128 Fed. 796, the Court said:

> "Jurisdiction is sustainable upon the ground, also, that a maritime duty was imposed upon the respondent by reason of the nature of the contracts, which related to a vessel and required her return to the owners. Jurisdiction attaches in case of a maritime contract, irrespective of the question whether it is to be performed on land or water."

In the present case a very considerable part of the work was done upon the vessel while she was still in the water. It was testified (fol. 71):

> "A. The vessel was brought to the yard; there was a large amount of work to be done in renewing decks that had been destroyed when the vessel was wrecked. She was submerged, as I understand, for a long time, and the ice floes had torn all the upper decks off; those decks had to be renewed. The work was started at Heffernan's; some of the material was on hand and was on board the vessel when she was brought over. We took up that work and put in the beams and laid the deck and did the deck work; that continued on until later she was docked.
>
> Q. This work you speak of now was done on her as she lay alongside your dock?
>
> A. Yes, sir.
>
> Q. Before she was taken out of the water?
>
> A. Yes, sir."

Since, then, the admiralty jurisdiction is clearly recognized in cases of repairs to vessels, and since the record here shows that the subject matter of the litigation is a contract for the repair of the vessel, the objection to the jurisdiction of the

admiralty court would seem to disappear; and it matters not whether these repairs were done while the vessel was in the water or on the railway.

The Robert W. Parsons, 191 U. S. 17, at page 33.

Counsel have probably developed their whole theory of this want of jurisdiction from the sentence quoted from the opinion in this case, viz.:

> "Had the vessel been hauled up by ways upon the land and there repaired, a different question might have been presented, as to which we express no opinion."

At best this cannot be said to be a final statement of the Court that if the repairs had been done upon a maritime railroad the Court would have had no jurisdiction.

A more recent decision of this Court was rendered in the case of *The Jefferson,* 215 U. S. 130. The Court there dealt with the question of salvage for a vessel when damaged while in a dry dock. The jurisdiction of the admiralty court was sustained upon the broad theory that:

> "The status of a vessel is not altered merely because in the one case the water is confined within the dock by means of gates closed when the tide begins to ebb, while in the other the water is removed and the gates are closed to prevent the inflow of the water during the work of repair."

And:

> "In reason we think it cannot be held that a ship or vessel employed in navigation and com-

> merce is any the less a maritime subject within the admiralty jurisdiction when, for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed in a dry dock and the water removed from about her, than would be such a vessel if fastened to a wharf in a dry harbor, where, by the natural recession of the water by the ebbing of the tide, she for a time might be upon dry land."

Since the decision in *The Jefferson* case, we submit that it would now be held, if necessary, that the query of Mr. Justice Brown in the *Parsons* case would be answered by giving the admiralty courts jurisdiction although the vessel were upon a marine railroad and completely out of the water while repairs were being made. If the repairs in question here were done by the appellee, then the argument for appellant must fall, because, as already noted, its argument proceeds upon the premise that the work was done by the shipowner.

We should not like, however, to admit that even though the work were done by the shipowner the admiralty Court would have no jurisdiction. The precise question was decided adversely to appellant's contention in *Wortman v. Griffith et al.*, 3 Blatch. 528; Fed. Cas. 18,057. The following cases are in accord with the decision in the Wortman case:

The Vidal Sala, 12 Fed. Rep. 207;
The Scotia, 35 Fed. 916, at p. 917;
The George T. Kemp, 2 Lowell, 477.

From the foregoing authorities, it seems settled that if the repairs were done by the yardowner it

makes no difference whether the ship was in the water or upon land; that the weight of authority is to the same effect although the repairs are done by the owner of the vessel. No substantial difference has been suggested between a vessel which is in a dry dock and a vessel which is hauled up on the land by a marine railroad into a shipyard and there undergoes repairs. There seems little, if any, difference in principle, as to whether the location is a dry dock or a marine railway, since both are structures used for the purpose of getting the vessel out of the water for the purpose of repair. The Congress of the United States evidently had this same situation in mind when it passed the Act of June 23, 1910, where it is stated: "Any person furnishing repairs, supplies or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic" etc. This Act is not cited for the purpose of claiming that Congress may make maritime those things which are not maritime or to override a decision of this Court on that question. It is, however, pertinent as showing the legislative definition of a marine railway. It is well known that prior to the passage of the Act of 1910 the question of some remedy for defects in the law regarding liens on domestic vessels had been very widely discussed. The use of marine railways, we take it, is comparatively recent, and no doubt Congress had in mind the query raised by the quotation from the opinion of Mr. Justice Brown in the Parsons case, when it *ex industria*

gave a maritime lien for repairs furnished while a vessel was using a "dry dock or marine railway".

It is urged that admiralty cannot take jurisdiction of any separate portion of a contract and that the contract must be maritime as a whole. This proceeds upon the theory already expressed of appellant that this contract was in the nature of a lease of the entire shipyard and that the repairs were done by the shipowner. Even in such a case, however, the authorities cited by counsel to the effect that the contract must be maritime in all its elements does not apply to the present case. Whatever the nature of the contract, it is evident that specific charges were to be made and were made for each of the services performed: towage, labor, materials, etc. In such a case the contract was undoubtedly severable, and even if certain of the elements of charges were not subject to maritime jurisdiction, nevertheless the others would be. It was held in *Pacific Coast S. S. Co. v. Ferguson*, decided by the Circuit Court of Appeals for the Ninth Circuit, 76 Fed. 993, that

> "The contract, as far as it pertained to the transportation, was purely a maritime contract, and enforceable in the admiralty. So far as it pertained to the railroad charges, it was not maritime, and the admiralty court is without jurisdiction to entertain it."

And in this case the Court retained jurisdiction over those charges which were so held to be maritime in their nature. The rule appears to be that if the contract is entire and not severable or apportion-

able as to charges, then it might not be of a maritime nature if it contained charges which were not maritime. But where the charges are apportionable, suit can be brought in admiralty on that portion of the contract which is maritime in its nature. In the present case the various items of charge are clearly set forth in the bills attached as exhibits to the libel.

III.

SUMMARY.

1. This Court has undoubted jurisdiction if the repairs were to be done by the yardowner. The only source from which this fact may be determined by the Court is the contract itself. This contract distinctly states that the yardowner is to make such repairs, and such was the construction placed upon it by all the pleadings.

2. This appeal is upon the sole ground that the subject matter is not maritime. The only argument in that regard is based upon random extracts from the testimony of certain witnesses, which it is claimed show that the understanding of these witnesses was that the contract was really a lease of the shipyard. This contract is in writing and speaks for itself. It is an agreement for repairs to be done to the vessel by Hall Brothers. They complied with their contract—did the repairs and paid the men who had charge of the work. The Court below has determined that this was not any

sort of lease or other non-maritime engagement for the turning over of certain equipment and its management and control to the shipowner. This determination is conclusive upon this appeal.

3. Appellant has sought affirmative relief from the Court below by its cross-libel, in which it expressly alleges that the subject matter of the controversy is within the admiralty jurisdiction of the Court. Appellant is estopped from disputing the validity of its own averments.

4. Even though the repairs had been done by the shipowner, the admiralty court has jurisdiction because the subject matter of the contract was essentially maritime in character, and the only authorities which have passed upon the same state of facts have upheld the jurisdiction.

5. This appeal is without merit since its solution depends upon a very obvious question of fact, and the premise upon which the appeal is based is demonstrably opposed to the record.

It is respectfully submitted that the decree of the District Court should be affirmed and that damages should be imposed upon appellant for a frivolous appeal.

Dated, San Francisco,
April 12, 1918.

WARREN GREGORY,
ALLEN L. CHICKERING,
Proctors for Appellee.